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No. 91-1944

In The

Supreme Court of the United States

October Term, 1992

NEIL A. USEDEN, AS TRUSTEE OF
THE AIR FLORIDA SYSTEM, INC.,
PROFIT SHARING PLAN AND TRUST,

Petitioner,

v.

GREENBERG TRAURIG HOFFMAN LIPOFF
ROSEN & QUENTEL, SUN BANK, INC.,
AND SUN BANK OF MIAMI, INC.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ROBERT A. SHUPACK
2250 International Place
100 Southeast 2nd Street
Miami, Florida 33131

and

EDWARD A. KAUFMAN
4650 S. E. Financial Center
200 South Biscayne
Boulevard
Miami, Florida 33131

Counsel for Petitioner

ADAM LAWRENCE
100 North Biscayne
Boulevard
21st Floor
Miami, Florida 33132
(305) 358-3371

Counsel of Record

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[1] Petitioner reasserts and incorporates herein by reference the Rule 29.1 statement set forth on page ii of his Petition.

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RESPONDENTS' "REASONS FOR DENYING THE WRIT"

RESPONDENTS' POINT I

Respondents' OBRA analysis (Brief at 6-8), founders on the untenable assumption that the House of Representatives' failure to enact an express cause of action against non-fiduciaries who aid and abet fiduciary breaches, somehow reflected the intent of Congress as a whole. The

entire Congress obviously never considered the clarifying amendment which the House Committee proposed; and the only plausible explanation for the House's own inaction is that the House believed the amendment was unnecessary because ERISA already permitted that cause of action. *See Pension Benefit Guaranty Corp. v. LTV Corp.*, 110 S.Ct. 2668, 2678 (1990); *United States v. Wells Fargo Bank*, 485 U.S. 351, 358 (1988). This conclusion is compelled by the very legislative history the respondents selectively quote (Brief at 6 n.8).

The immediate subheading to the House Committee's discussion of *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988) significantly reads: "*Clarification of liability of knowing participants in breaches of fiduciary duty. . . .* " The Committee recognized that under existing law "[a]ll but one of the Circuit Courts of Appeal that have considered the issue have held that the broad remedial powers conferred on federal courts under ERISA section 502(a)(3) and (5) create an implied cause of action against non-fiduciaries who knowingly participate in breaches of fiduciary duty proscribed by ERISA." However, because "a divided panel of the Ninth Circuit" in *Nieto* had aberrantly denied a remedy against non-fiduciaries, the Committee concluded that an amendment was appropriate in order to "resolve[ ] the conflict in the courts of appeal by *clarifying* Congressional intent." H.R. Rep. No. 247, 101st Cong. 1st Sess. 77, *reprinted in* 1989 U.S. Code Cong. & Admin. News 1906, 1969-1970 (emphasis added).

There can be no doubt after reading this section of the House Committee report in its entirety that the Committee's intent was to clarify ERISA, not create a cause of action that ERISA did not previously provide. The

House's rejection of the proposed amendment – which, pointedly, was never mentioned in the far more authoritative Conference Committee Report of the Congress as a whole – suggests nothing more than that the House believed clarification of ERISA §502(a) was unnecessary. As this Court observed in *Jones v. Liberty Glass Co.*, 332 U.S. 524, 534 (1947), "We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation. In short, the original legislative action speaks louder than such judicial action."

Next, Respondents twice misstate (Brief at 7, 8) the Petitioner's unambiguous arguments in Point II of his Petition. Petitioner never remotely suggested that 29 U.S.C. §1132(*l*) *created* a private cause of action against non-fiduciaries. Indeed, petitioner expressly contended to the contrary: "Section 1132(*l*) clearly *does not create* a monetary cause of action against non-fiduciaries . . . . " (Petition at 16). Congress' enactment of 1132(*l*), as Petitioner took pains to repeatedly point out, rested on the tacit assumption that §1132(a) *already* provided a cause of action against non-fiduciaries who participate in a fiduciary breach.

RESPONDENTS' POINT II

Petitioner is unable to discover where in his Petition he utters the hyperbole that Respondents have attributed to him: "that *Firestone* stands for the proposition that the entire body of the common law of trusts is to be engrafted onto ERISA 'lock, stock and barrel'." (Brief at 11). It was

unnecessary for Petitioner to have taken any position, and he did not in fact express one in his Petition, on whether the *entire* body of trust law is incorporated into ERISA, since his Petition was limited to the far narrower issue of whether ERISA incorporated principles of non-fiduciary liability from the common law of trusts. (Petition at 24-25).

RESPONDENTS' POINT III

Respondents argue that if ERISA does not allow damages against non-fiduciaries, no remedial "gap" would open because state courts would then be free to step in and provide a common law remedy (Brief at 15-16). Assuming this is the view of the Second and Third Circuits, whose case law Respondents cite, Petitioner unfortunately finds himself in the Eleventh Circuit whose conception of the preemptive scope of 29 U.S.C. §1144 is far more expansive.

The Eleventh Circuit, in *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987), emphatically asserts that there can and will be gaps between ERISA and state law that state courts simply may not fill. "A gap," said the court, "is legitimate if it is the result intended by Congress." *Id.* at 1565. The Eleventh Circuit has accordingly concluded that common law actions in negligence and fraud against a non-fiduciary investment advisor, an insurance broker, and the employee of the broker, are preempted under ERISA. *See Farlow v. Union Central Life Ins. Co.*, 874 F.2d 791, 794 (11th Cir. 1989); *Belasco v. W. K. P. Wilson & Sons, Inc.*, 833 F.2d 277, 281 (11th Cir. 1987). *See, generally;*

Ingersoll-Rand Co. v. McClendon, 111 S.Ct. 478, 482 (1990), which confirms the Eleventh Circuit's approach to ERISA preemption by emphasizing that 29 U.S.C. §1144 must be "expansively applied".

Any state causes of action the Petitioner might have asserted against Greenberg Traurig and Sun Bank would necessarily have implicated ERISA's fiduciary standards and the defendants' responsibilities under the Plan, and thus have been "intertwined" with, and "not wholly remote in content" from, an ERISA cause of action. *See Farlow*, 874 F.2d at 794. "In enacting ERISA, [one of] Congress' primary concern[s] was with the mismanagement of funds accumulated to finance employee benefits." *Massachusetts v. Monash*, 490 U.S. 107, 115 (1989). The Eleventh Circuit would almost certainly have concluded that Petitioner's state causes of action offended ERISA's goal of federal uniformity, "contravene[d] the structure and purpose" of ERISA, *Howard*, 807 F.2d at 1565, and were preempted by ERISA, to the extent those non-uniform state remedies were invoked to penalize acts intimately connected with the fiscal management of an ERISA plan. *See Ingersoll-Rand*, 111 S.Ct. at 483-484 (If a state cause of action requires the plaintiff to plead that an ERISA plan existed and prove that the defendant's conduct impacted on the plaintiff's ERISA rights, and where there would be no state cause of action if there was no plan, ERISA will preempt that cause of action)[2].

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[2] Respondents' reliance upon 28 U.S.C. §1367 as an alternative source of federal jurisdiction is misplaced. The Petitioner's claims against the Respondents antedated December 1, 1990, the effective date of §1367. *See* Pub.L. No. 101-650, §310(c).

Petitioner's fear of being caught between a broad reading of ERISA's preemption clause and a narrow reading of ERISA's remedial provisions is thus, at least in the Eleventh Circuit, a legitimate one.

CONCLUSION

For the foregoing reasons, and those previously set forth, the Petition for Certiorari should be granted.

Respectfully submitted,

ROBERT A. SHUPACK
2250 International Place
100 Southeast 2nd Street
Miami, Florida 33131

and

EDWARD A. KAUFMAN
4650 S. E. Financial Center
200 South Biscayne
Boulevard
Miami, Florida 33131

Counsel for Petitioner

ADAM LAWRENCE
100 North Biscayne
Boulevard
21st Floor
Miami, Florida 33132
(305) 358-3371

Counsel of Record